

NO. 45485-8-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JESSICA MAE MATHESON,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

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**BRIEF OF RESPONDENT**

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Ruling Granting Motion on the Merits to Affirm

## I. INTRODUCTION

Jessica Matheson voluntarily applied for and obtained a registration certificate from the State of Washington to conduct business as a cigarette and tobacco wholesaler. AR at 40.<sup>1</sup> This certificate, along with her license to operate as a cigarette wholesaler, allowed her to purchase unstamped and untaxed cigarettes. AR at 110, ¶ 3. Less than a month after obtaining these documents she purchased 703,400 packs of unstamped and untaxed cigarettes from wholesalers located in Spokane, Washington, and failed to report the disposition of the cigarettes to the Department of Revenue. AR at 110, ¶¶ 4, 5. Subsequently, the Department issued a tax assessment against Jessica Matheson, d/b/a Jess's Wholesale, in the amount of \$9,142,016.14 for taxes and penalties owed for the period July 1, 2006, through June 30, 2007. AR at 338.

When the assessment was not paid, the Department filed a tax warrant for unpaid taxes. AR at 337-38. The taxes remain unpaid. When a registered business fails to pay any state taxes it owes, it can lose its authorization to conduct business in the state. The Department sent a notice of the hearing to revoke Matheson's certificate of registration to her last address on file and to her representative listed from her business

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<sup>1</sup> AR refers to Administrative Record.

registration file. Matheson did not appear at the brief adjudicative hearing conducted by the Department, but her attorney did.

The Department revoked her registration certificate, and she sought review before the Department. An administrative law judge reviewed the transcript and all of the evidence submitted, including additional information requested of the parties, and affirmed the revocation. Matheson then petitioned for judicial review before the Thurston County Superior Court, which affirmed the Department's Order revoking her registration certificate. Matheson now seeks judicial review in this Court of the Department of Revenue's decision to revoke her Washington registration certificate. The Department properly revoked Matheson's registration certificate to do business in the State of Washington. The Department respectfully requests that this Court affirm its decision.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Did the Department properly revoke the certificate of registration issued to Jessica Matheson, d/b/a Jess's Wholesale? (Petitioner's Assignments of Error 1, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27)<sup>2</sup>

2. Does Matheson's status as an enrolled member of an Indian tribe affect the applicability of the registration certificate revocation statute and hearing process? (Petitioner's Assignments of Error 2 and 10).

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<sup>2</sup> Petitioner makes assignments of error, but fails to identify the issues pertaining to the assignments of error as required by RAP 10.3(4). The Department has attempted to identify the assignments of error with the issues.

### III. COUNTERSTATEMENT OF THE FACTS

#### A. Matheson Voluntarily Applied For And Was Granted A Washington Business License.

On June 6, 2006, Jessica Matheson filed a license application to do business in the State of Washington as the sole owner; under the name Jess's Wholesale. AR at 40-43. She indicated in her application that her business would be wholesaling cigarettes and tobacco products and that she would be open for business on the same date as the license application date, June 6th. AR at 40-42. In the application, she attested that the business would operate at a street address in Milton, Washington, and that she resided in Fife, Washington. AR at 41. She was granted a license to act as a Washington licensed cigarette wholesaler.

#### B. After Receiving Her Business License, Matheson Purchased 703,400 Packs Of Unstamped Cigarettes Without Reporting The Purchases To The Department.

Between July 1, 2006, and June 30, 2007, based upon reports received from two Washington licensed cigarette wholesalers in Spokane, Jess's Wholesale purchased 703,400 packs of unstamped cigarettes from these two cigarette wholesalers.<sup>3</sup> AR at 55 & 110, ¶ 4. The cigarettes

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<sup>3</sup> Cigarette tax stamps must be affixed on all packages of cigarettes for sale in the State of Washington to indicate that the cigarette tax has been paid. RCW 82.24.030. Only licensed Washington wholesalers may possess the stamps. *Id.* And only licensed wholesalers may possess unstamped cigarettes. RCW 82.24.040. Licensed wholesalers have 72 hours after receipt of unstamped cigarettes to purchase cigarette tax stamps and

were picked up from businesses located in Spokane. AR at 110, ¶ 4.

Matheson failed to complete her required reports to indicate the disposition of the unstamped cigarettes that she had purchased from the Spokane cigarette wholesalers. AR at 110, ¶ 5.

The Department conducted an examination of Jess's Wholesale's records and her failure to report the disposition of the cigarettes. In January 2008, the Department issued an assessment to Matheson for \$1,424,385 in cigarette tax and a \$10-per-pack penalty of \$7,034,000 under RCW 82.24.120(1), plus additional penalties and interest. AR at 52-60. Matheson's failure to accurately report the disposition of the unstamped cigarettes as required of licensed cigarette wholesalers made her liable for the cigarette tax and penalties under RCW 82.24.120. Matheson appealed the assessment to the Department's Appeals Division, which issued a determination upholding the assessment. AR at 11, ¶¶ 2, 3. Matheson then filed an appeal of the assessment in the Board of Tax Appeals. AR at 11, ¶ 4.

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affix the stamps to the cigarette packages. WAC 458-20-186(204)(d)(i). It is unlawful to purchase or possess unstamped cigarettes otherwise. RCW 82.24.110(1)(a). However, any person, including an Indian tribal organization, can bring into the state unstamped cigarettes, but only after providing advance notice to the Liquor Control Board and that within 72 hours stamps are affixed to the cigarette packages or the taxes paid. RCW 82.24.250(1), (2), (7)(c); WAC 458-20-186(204)(d)(i). Matheson did not provide advance notice, pay the cigarette taxes, nor did her business qualify as an "Indian tribal organization" as defined in RCW 82.24.010(6).

**C. The Board Of Tax Appeals Upheld the Department's Assessment Of Taxes And Penalties.**

The Board conducted a formal hearing at which both parties presented exhibits and witness testimony. The Board issued a decision upholding the Department's assessment, to which Matheson sought reconsideration. Thereafter, the Board issued a Revised Final Decision. AR at 108-23 (adding details about how Matheson conducted business outside Indian Country). The Board recognized that cigarette wholesalers making sales of untaxed cigarettes must report those sales to the Department. AR at 110. Because Matheson took possession of the cigarettes in Spokane, outside Indian Country, she was conducting business off the reservation. *Id.* In fact, she could purchase unstamped cigarettes off the reservation only because she had a state wholesaler's license. *Id.*

Matheson is an enrolled member of the Puyallup Indian Tribe. AR at 46. Matheson asserted she had sold the unstamped cigarettes on the Puyallup Reservation or in Idaho. AR at 111, 116-19. The Board found there was no credible, contemporaneous documentation to show how Ms. Matheson had disposed of the unstamped cigarettes. *Id.* The Board outlined the conflicting assertions in both testimony and documents and concluded they were not credible. AR at 111-12. The Board, finding one

retail manager credible, found that Matheson did not sell cigarettes onto the Puyallup Reservation. AR at 116.

Turning to the claim the cigarettes were sold into Idaho, the Board found the testimony of her brother, Nick Matheson, was not credible for several reasons, including: (1) the Mathesons' did not report sales into Idaho until 2010; (2) Mr. Matheson did not know how much he paid for the cigarettes; (3) he had no documentation; and (4) he signed the amended Schedule C reports,<sup>4</sup> but he could not recall how they were created or by whom. AR at 116-18.

The Board concluded as follows: Matheson had the burden to prove the assessment was not proper. AR at 122. Her enrollment in the Puyallup Tribe had no bearing on the requirement that she must keep and provide to the Department accurate records as a licensed Washington cigarette wholesaler because Indians engaging in activities outside of Indian Country are subject to nondiscriminatory state laws of general application, including tax statutes. *Id.* During 2006 and 2007, Matheson purchased 703,400 packs of unstamped cigarettes outside of Indian Country, but she failed to account for their sale. AR at 122-23. Therefore, Matheson was liable for the tax and penalties unless she could prove a

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<sup>4</sup> In "Schedule C" reports filed monthly, manufacturers and wholesalers must report all sales of cigarettes in the state. AR at 109; WAC 458-20-186(702)(a).

non-taxable disposition of the cigarettes. AR at 123. The Board concluded that she had not met her burden and upheld the assessment. *Id.*

Matheson petitioned for review of the Board's decision in Thurston County Superior Court. AR at 11.

**D. The Superior Court Dismissed Matheson's Challenge To The Board Of Tax Appeals Decision.**

The Department moved to dismiss the petition for judicial review because Matheson failed to satisfy the statutory prerequisite in RCW 82.03.180 that the taxpayer, within the 30-day period for petitioning for review, pay "in full the contested tax, together with all penalties and interest thereon." After the Department moved to dismiss her petition for judicial review, Matheson sought a restraining order pursuant to RCW 82.32.150 to enjoin collection of the tax. AR at 126. The superior court dismissed the petition for lack of jurisdiction because Matheson failed to comply with RCW 82.03.180. AR at 126-27. The court also denied Matheson's motion for preliminary injunction. *Id.*

**E. The Court Of Appeals Granted The Department's Motion On The Merits To Affirm The Superior Court.**

Matheson filed an appeal to the Court of Appeals. The Department filed a motion on the merits under RAP 18.14 for an order affirming the

superior court's order, which the Court of Appeals granted.<sup>5</sup> The Washington Supreme Court denied Matheson's petition for discretionary review. *Jessica Matheson d/b/a/ Jess's Wholesale v. Dep't of Revenue*, 177 Wn.2d 1004, 300 P.3d 415 (2013).

**F. Matheson Failed To Pay A Tax Warrant For Tax And Penalties, Which Triggered The Process To Cancel Her Business License.**

On September 29, 2009, the Department issued a tax warrant for taxes and penalties related to the unpaid assessment in the amount of \$9,142,016.14 and sent the tax warrant by first-class mail to Matheson's business address listed with the Department.<sup>6</sup> AR at 336-38. Matheson failed to pay the amounts due and on January 11, 2010, the Department filed the warrant with the Clerk of the Superior Court in Thurston County, which entered it as a judgment. AR 336, 339-41. Over two years later, Matheson still had failed to pay the assessment, and the Department issued a Notice of Hearing on February 21, 2012, to revoke the registration certificate issued to Jessica Matheson. AR at 336, 342-45.

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<sup>5</sup> The Court may take judicial notice of the proceedings in that appeal. A copy of the index of Court of Appeals pleadings can be found at [http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=427231&searchtype=aNumber&cert\\_itl\\_nu=A02&filingDate=2011-10-2400:00:00.0&courtClassCode=A&casekey=157371191&courtname=COA, Division II](http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=427231&searchtype=aNumber&cert_itl_nu=A02&filingDate=2011-10-2400:00:00.0&courtClassCode=A&casekey=157371191&courtname=COA, Division II). (last visited April 29, 2014).

<sup>6</sup> To collect an assessment of taxes, the Department issues a tax warrant and files it with the clerk of the superior court. *See* RCW 82.32.210; .212.

The Department served Matheson by first-class mail to her business address provided to the Department from her registration certificate application and on file with the Department, 7403 Pacific Hwy E. Milton, WA. AR at 137, 336, 342-45. The Department also mailed and faxed the Notice of Hearing to Matheson's representative, Mr. Robert Kovacevich. *Id.* The Department noted that there were several address changes for this business registration in its Business Registration Management System, but none of the changes were to the business location. AR at 16, ¶ 26, 137. Matheson also listed the Milton address as the address for her cigarette wholesaler's license and the address for her performance bond. AR at 137. In an affidavit filed in Thurston County Court, Matheson also stated, "My location for license contact on the Puyallup Indian Reservation is 7403 Pacific Highway, East, Milton, WA." AR at 48. At the hearing, Mr. Kovacevich confirmed that Matheson's father allowed her to use that address as her business address. AR at 327.

The Department held a brief adjudicative hearing on March 21, 2012. AR at 299-302. Matheson did not attend the revocation hearing, but Mr. Kovacevich attended and presented argument. AR at 299-335. The Department upheld the revocation of her registration certificate. Pursuant to the Department's rules, she appealed the decision to the Appeals Division within the Department. AR at 292-95. The Reviewing Officer provided

both sides the opportunity to present additional evidence. AR at 30-95, 97-104, 105-13, 136-38. The Reviewing Officer upheld the revocation and issued Findings of Fact, Conclusions of Law and Final Order on July 18, 2012.<sup>7</sup> AR at 10-29.

Matheson subsequently petitioned for judicial review under the Administrative Procedures Act (APA) before the Thurston County Superior Court. CP 4-20. On September 27, 2013, the Honorable Gary Tabor entered an Order Affirming the Department's decision. CP 64-67. Matheson's appeal to this Court followed on October 17, 2013.

#### IV. ARGUMENT

**A. A Court Will Not Overturn An Agency's Factual Findings Unless They Are Clearly Erroneous And The Court Is Definitely And Firmly Convinced A Mistake Has Been Made.**

Under the APA, the burden of demonstrating the invalidity of agency action is on the party asserting that the agency erred. RCW 34.05.570(1)(a). This burden continues through judicial review of the agency's action. On review, this Court sits in the same position as the superior court and applies the APA standard of review, RCW 34.05.570(3)(a)-(i), directly to the record before the agency.

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<sup>7</sup> The Department of Revenue Reviewing Officer issued an Errata correcting the erroneous references to the Compliance Division of the Department and replacing the references to the correct division responsible for requesting and supporting the business revocation, Special Programs Division. The changes did not disturb the holding of the Final Order. AR at 7, 2-5.

*Department of Revenue v. Bi-Mor, Inc.*, 171 Wn. App. 197, 201-02, 286 P.3d 417 (2012).

On review, a court examines the entire record and determines whether substantial evidence supports an agency's findings of fact. RCW 34.05.570(3)(e). Substantial evidence is "evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise."

*Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433, 909 P.2d 1294 (1995), *cert. denied*, 518 U.S. 1006 (1996) (quoting *Nghiem v. State*, 73 Wn. App. 405, 412, 869 P.2d 1086 (1994)). An agency's factual findings will be overturned "only if they are clearly erroneous and we are definitely and firmly convinced that a mistake has been made." *Sprint Spectrum, LP v. Dep't of Revenue*, 174 Wn. App. 645, 653-54, 302 P.3d 1280 (2013) (quoting *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004)).

The court reviews the evidence "in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority." *Sprint Spectrum*, 174 Wn. App. at 654 (citing *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)). Unchallenged findings of fact are verities on appeal. *Heidgerken v. Dep't of Natural Resources*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000).

The court reviews the agency's legal conclusions under the error of law standard. *Cascade Court Limited Partnership v. Noble*, 105 Wn. App. 563, 567, 20 P.3d 997 (2001).

Applying these standards of review, there was no mistake made in revoking the business registration certificate issued to Jessica Matheson. Just as the Superior Court did, this Court should affirm the agency's order.

**B. Jessica Matheson Voluntarily Obtained A Registration Certificate To Conduct Business In Washington.**

To conduct business in Washington, any form of a business entity, whether a corporation or sole proprietor, must register and obtain a registration certificate authorizing the business activity from the Department of Revenue. *See* RCW 82.32.030 (“[I]f any person engages in any business or performs any act upon which a tax is imposed . . . he or she must, under such rules as the department prescribes, apply for and obtain from the department a registration certificate.”) In Washington, persons desiring to do business in the state complete a “Master Application” that includes the registration and all necessary licenses needed to conduct business in the state. *See* RCW 19.02.070.

Jessica Matheson voluntarily applied for and obtained a registration certificate. AR at 40-43. On the Master Application for registration and license, Matheson requested a license to operate as a

“cigarette and tobacco wholesaler” and indicated the amount of the fee for the license as \$650. AR at 40. She was granted a license to act as a Washington licensed cigarette wholesaler.

**1. Matheson was required to comply with the cigarette and tobacco wholesaler laws and regulations.**

Upon issuance of the cigarette wholesaler license, Jessica Matheson was authorized to purchase and transport unstamped, untaxed cigarettes throughout the state. *See* RCW 82.24.040. But for the cigarette wholesaler license, she would not have access to unstamped and untaxed cigarettes.<sup>8</sup> At the time she obtained her license<sup>9</sup>, she was required to submit a complete report of the sale and transportation of cigarettes and file a “Schedule C” report that shows the final disposition of the cigarettes. *See* WAC 458-20-702(a) and (b) (2006).

**2. Matheson failed to comply with the obligations of a cigarette wholesaler.**

After she was issued a cigarette wholesaler license, Matheson, operating as Jess’s Wholesale, purchased 703,400 packs of unstamped and untaxed cigarettes from two Spokane located wholesalers between July 1,

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<sup>8</sup> Any person, including an Indian tribal organization, can bring into the state unstamped cigarettes, but only after providing advance notice to the Liquor Control Board and within 72 hours stamps are affixed to the cigarette packages or the taxes paid. RCW 82.24.250(1), (2), (7)(c); WAC 458-20-186(204)(d)(i).

<sup>9</sup> In 2009, the Liquor Control Board became responsible for licensing and regulating cigarette wholesalers. *See* Laws of 2009, ch. 154, § 1. The Department’s authority to issue registration certificates and to revoke certificates under RCW 82.32.215 did not change.

2006 and June 30, 2007. AR at 110. She was required to report these purchases to the Department of Revenue and account for the disposition of the cigarettes. Jess's Wholesale was required to provide documentation as to the disposition of the cigarettes, including whether the cigarettes were sold to an entity that was exempt from the cigarette tax, e.g., the federal government, an out-of-state purchaser, or another wholesaler. AR at 110. In a contested hearing, the Board of Tax Appeals found that Jess's Wholesale failed to comply with this requirement. *Id.* Failing to comply with this requirement subjected Matheson to the cigarette tax and penalties under RCW 82.24.120(1). It states:

(1) If any person, subject to the provisions of this chapter, or any rules adopted by the department of revenue . . . or to have violated any of the provisions of this chapter or rules adopted by the department of revenue in the administration hereof, there shall be assessed and collected from such person, **in addition to any tax that may be found due, a remedial penalty equal to the greater of ten dollars per package of unstamped cigarettes** or two hundred fifty dollars . . .

The Board of Tax Appeals issued a decision upholding the Department's assessment. AR at 108-23. The Department proceeded to attempt to collect its assessment by filing a warrant for unpaid taxes pursuant to RCW 82.32.210-212. *See* AR at 336-41. Matheson does not contest that she failed to pay the tax assessment.

However, Matheson spends a significant portion of her argument challenging the underlying Board of Tax Appeal's decision upholding the assessment and asserting that the cigarettes were not subject to tax. Pet. Br. at 30-37, 48-54. Res judicata bars these challenges. This doctrine prevents re-litigation of the same claim where a subsequent claim involves the same subject matter, cause of action, persons and parties, and quality of persons for or against the claim made. *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). All of these elements are met. Matheson's attempt to challenge the underlying assessment is barred by res judicata; her only cognizable challenge in this case is to the process by which her registration certificate was revoked.<sup>10</sup>

**C. The Department Properly Revoked the Registration Certificate Issued to Jessica Matheson d/b/a Jess's Wholesale.**

RCW 82.32.215 provides the Department authority to revoke a registration certificate if "any warrant issued under this chapter is not paid within thirty days after it has been filed with the clerk of superior court." Once revoked, it cannot be reinstated or a new one issued, "until . . . the amount due on the warrant has been paid or provisions for payment

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<sup>10</sup> Matheson argues that she can challenge the underlying decision, because there was no "in personam jurisdiction." Pet. Br. at 31-32. Matheson submitted herself to the jurisdiction of the Department and to the Board. She voluntarily obtained a registration certificate and cigarette wholesaler license which as a condition required her to comply with the state's cigarette laws and Department's rules. AR at 40-43. When she chose not to comply with the Department's rules to report her purchases of the unstamped and untaxed cigarettes, she was served with the tax assessment and she subsequently challenged the assessment before the Board under RCW 82.03.130(a) and 82.03.190.

satisfactory to the department have been entered. . . .” RCW 82.32.215(3)(a).

**1. The Department complied with its regulations revoking Jessica Matheson’s registration certificate.**

As directed by RCW 82.32.300, the Department has promulgated rules providing taxpayers the process for the hearing for revocation of registration certificates. *See* WAC 458-20-10001(1)-(10).<sup>11</sup> The Department adopted the brief adjudicative procedure outlined in the APA, at RCW 34.05.482-.494, to conduct these revocation hearings. Under that procedure, the Department determines whether 30 days have elapsed from the time the tax warrant was issued and filed in superior court and whether the taxpayer has not paid the assessment or made arrangements to make payments. AR at 342-43.

Matheson had already challenged the underlying tax assessment before the Department and appealed that matter to the Board of Tax Appeals. As explained above, she therefore is barred by *res judicata* in challenging the underlying tax assessment. Because she failed to pay the assessment, the Department properly invoked the hearing process necessary to revoke the registration certificate after it had issued the tax warrant to Jessica Matheson d/b/a Jess’s Wholesale, filed the tax warrant

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<sup>11</sup> Attached in the Appendix.

in Thurston County, and also filed an abstract of the judgment in Pierce County.

**2. Substantial evidence supports the Department's findings of fact that Matheson was properly served notice of the hearing.**

Matheson bears the burden to prove that under RCW 82.32.215 or WAC 458-20-10001 her registration certificate should not have been revoked. *See* RCW 34.05.570(1)(a) "The burden of demonstrating the invalidity of agency action is on the party assert invalidity." Under the APA, the court reviews the findings of fact of the agency decision maker, and not findings entered in the initial order. *Galvis v. Dep't of Transp.*, 140 Wn. App. 693, 709, 167 P.3d 584 (2007), *review denied*, 163 Wn.2d 1041 (2008). Matheson must assign error to the Department's findings of fact; otherwise the court treats such findings as verities on appeal. *Id.* Matheson fails to assign error to any of the Department's findings of fact.

The administrative law judge found that the Department issued a tax warrant against Jessica Matheson d/b/a Jess's Wholesale on September 29, 2009. AR at 20 (FOF 2), 336-38. On January 11, 2010, the Department filed the tax warrant with the Thurston County Superior Court, which entered it as a judgment. AR at 20 (FOF 4), 339-41. An abstract of the judgment was filed in Pierce County, the last known business address for Jess's Wholesale. AR at 20 (FOF 5), 340-41.

Although the Department was successful in executing on her cigarette wholesaler's performance bond, which she was required to obtain upon receiving a cigarette wholesaler license; this amount did not satisfy the tax assessment. Matheson failed to pay the outstanding obligation. AR at 20 (FOF 7). Under RCW 82.32.215, upon waiting the statutorily required 30 days after the warrant was filed with the clerk of the court, the Department proceeded to initiate the process to revoke Matheson's registration certificate. AR at 20 (FOF 7).

On February 21, 2012, the Department mailed the Notice of Revocation hearing to Matheson and her representative, Mr. Robert Kovacevich. AR at 20 (FOF 7), 342-44. The Department mailed the notice of hearing to Matheson first-class to the address listed with the Department on her registration and license application as 7403 Pacific Hwy. E. Milton, WA. *Id.* Mr. Kovacevich indicated at the initial certificate of registration revocation hearing that Ms. Matheson's father allowed her to use that address, which was his address, for her business. AR at 327. Additionally, the Department faxed the notice of the revocation hearing to Mr. Kovacevich. AR at 345.

Matheson appears to argue that the Department lacked jurisdiction to revoke the registration certificate because of improper service. Pet. Br. at 21. "Jurisdiction to hear a case is subject to review; if no jurisdiction

exists the proceedings are null and void . . . holds that defective service in the first case allows reconsideration.” She also argues that “state officials have no jurisdiction on Indian reservations either to serve process or to enforce a state judgment.” Pet. Br. at 43.<sup>12</sup> To the extent Matheson attempts to argue that she was not properly served the tax warrant, RCW 34.05.554 bars such argument, because she did not raise this issue before the agency nor has she demonstrated that any of the exceptions under RCW 34.05.554 apply. “Issues not raised before the agency may not be raised on appeal....” RCW 34.05.554(1) (with exceptions not applicable here). *See also Wells v. W. Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 675-76, 997 P.2d 405 (2000) (“It is clear that a party seeking to challenge an agency’s decision on a particular issue at the superior court level must have raised the issue before the agency.”)

Even if RCW 34.05.554 did not bar Matheson’s argument that she was not properly served the notice of hearing revoking her registration certificate, substantial evidence supports the Department’s findings and conclusions that she *was* properly served notice of the hearing. Contrary to her assertion that she had to be personally served with the notice, the

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<sup>12</sup> For off reservation conduct, purchasing cigarettes in Spokane, the state could enter the reservation for process service. *See Nevada v. Hicks*, 533 U.S. 353, 364-66, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001) (state officials were not barred from entering Indian reservation to execute a search warrant against a tribal member for violating law occurring outside the reservation.); *See also, State v. Clark*, 178 Wn.2d 19, 24, 308 P.3d 590 (2013).

Department's rules provide for service of notices by mail. *See* WAC 458-20-10001(5). The governing statute provides for service by mail: under RCW 82.32.130, if a notice is mailed, it must be addressed "to the address of the taxpayer as shown by the records of the department . . . ." The APA also authorizes service by mail. *See* RCW 34.05.010(19); *see also Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 215-16, 103 P.3d 193 (2004) (holding that civil rules apply only where specifically authorized and do not apply under RCW 34.05.542 or 34.05.010). Accordingly, Matheson did not have a right to be personally served with the notice of hearing.

Under the Department's rules, when Matheson obtained a certificate of registration she was bound to comply with the rules and procedures for the revocation of the certificate. WAC 458-20-10001. The Department mailed the notice to the address listed on file in Milton, Washington. AR at 20 (FOF 7). The revenue agent who issued the notice of hearing indicated that on the Department's records, address changes were noted on four different occasions, but there had been no change to the business address for service. AR at 137. Further, in checking the Department's records, that business address was the same address she gave for the service address on her Cigarette Wholesale Dealer Proper Performance Bond. AR at 137. Additionally, her representative was

provided notice of the hearing. AR at 344-45. He not only appeared at the hearing, but provided written and oral argument, including filing an appeal to the Department's appeal division.

Matheson also argues that the Department should have known to use her address in Idaho to send her any notices, because she filed an affidavit in Thurston County Superior Court regarding her appeal of the Board of Tax Appeals decision. Pet. Br. at 26-27. However, that affidavit specifically states that her address for her license to operate as a cigarette wholesaler was the Pacific Highway address in Milton, WA: "My location for license contact on the Puyallup Indian Reservation is 7403 Pacific Highway East, Milton, WA. 98534." AR at 47-48. The Department properly provided her notice of the hearing and did not violate her due process rights. She was provided due process.

**D. Jessica Matheson's Status As An Enrolled Member Of An Indian Tribe Does Not Affect The Applicability Of The Certificate Of Registration Revocation Statute Or Hearing Process.**

Despite the fact that Matheson voluntarily applied for and obtained a Washington registration certificate and license to operate as a cigarette wholesaler, voluntarily subjecting herself to state authority related to the certificate and license, she makes a number of arguments that her status as

an Indian exempts her from any state regulation or authority. All of her arguments lack merit.

**1. Matheson’s status as an Indian has no legal bearing in this case.**

Matheson asserts that she had a constitutional right “to be free of state licensing laws,” and RCW 82.32.215 does not apply to her because she is a “tribal Indian” and resident of Idaho. Pet. Br. at 38-39.

But she was not required to apply for a registration certificate or cigarette wholesaler license. The state did not compel her to engage in the cigarette business. It is a verity on appeal that she voluntarily applied for a registration certificate and a cigarette wholesaler license. AR at 40-43, 46. Once she obtained these documents, she could purchase and transport untaxed, unstamped cigarettes. She does not contest that her license was used to purchase 703,400 packs of cigarettes from two Spokane, Washington licensed wholesalers.

Well-established federal and state authority establishes that Indians coming off the reservation are subject to the authority and regulations of the state, including payment of taxes.<sup>13</sup> *Mescalero Apache Tribe v. Jones*,

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<sup>13</sup> Contrary to Matheson’s assertion in her “Preamble to Argument” section that “States have never had jurisdiction over Native American Indians who reside on their reservation,” the state can exercise some criminal and civil jurisdiction on an Indian reservation for certain actions, i.e., compulsory school attendance, public assistance, and operation of a motor vehicle, to name a few. See RCW 37.12.010; *State v. Clark*, 178 Wn.2d 19, 24, 308 P.3d 590 (2013).

411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.”); *See also Bercier v. Kiga*, 127 Wn. App. 809, 818, 103 P.3d 232 (2004) (member of Fort Peck Tribe in Montana operating a smoke shop business on the Puyallup reservation held not exempt from cigarette and tobacco taxes.)

In conjunction with her arguments that she was exempt from the Department’s tax collection because she is an Indian, Matheson argues that the case should have been transferred to tribal court, pursuant to CR 82.5(a). Pet. Br. at 39. First, the Court can disregard this argument as Matheson failed to raise this argument before the Department. *See* RCW 34.05.554. Second, it is not clear which “case” she refers to, the collection of the tax, the license revocation proceeding, or the judicial review of the Department’s decision. Even if the Court were to examine her argument, it lacks merit because CR 82.5 does not apply.

The rule applies to actions filed in superior court, where a federal law exclusively provides jurisdiction to an Indian tribal court. The rule in part states:

Where an action is brought in the superior court of any county of this state, and where, under the Laws of the United States, exclusive jurisdiction over the matter in

controversy has been granted or reserved to an Indian tribal court. . .

CR 82.5(a).

Matheson fails to cite any laws of the United States that granted or reserved to an Indian tribal court exclusive jurisdiction (or any jurisdiction) to review state tax collection, license revocation proceedings or judicial reviews of proceedings like this one. None exist in this case.

Regardless of Matheson's status as an Indian or her residency, by voluntarily applying for and obtaining a Washington registration certificate and license to operate as a cigarette wholesaler in Washington, she made herself subject to the jurisdiction and authority of the State of Washington.

**2. The Board of Tax Appeals found Matheson conducted business outside Indian country.**

Matheson argues throughout her brief that the state lacked jurisdiction over her because she was not required to have a license because she is an Indian who remained on the reservation and did not conduct any business in the State of Washington. Pet. Br. at 32-37; 48-49; 51-62. Matheson's arguments are repudiated by the underlying facts found by the Board of Tax Appeals, including her own records submitted on her behalf.

Matheson has never contested that under her license she purchased 703,400 packs of cigarettes from two Washington cigarette wholesalers in Spokane, Washington. Her argument was that the cigarettes she purchased were exempt from cigarette tax. Setting aside the issue that she failed to report the disposition of the cigarettes, the evidence the Board considered supported the Board's findings that Jess's Wholesale conducted business under her cigarette wholesaler license and not on any Indian reservation. AR at 110. Furthermore, Matheson's claim that she "never had any activity in Washington that supports jurisdiction" (Pet. Br. at 32) was already considered and rejected by this Court.<sup>14</sup> Therefore, as explained above, res judicata bars Matheson from raising this claim.

**E. The Initial Hearing And Administrative Review Were Properly Conducted.**

Matheson argues that, at the brief adjudicative hearing, the presiding officer acted as an advocate by asking questions of the representative and of the Department. Pet. Br. at 45. She asserts that this violates "inherent unfairness and is a lack of due process." Pet. Br. at 47. She also appears to argue that the Department's Reviewing Officer erred

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<sup>14</sup> The Court Commissioner's decision is attached in the appendix. Pursuant to RAP 17.7, a panel of this Court denied Matheson's motion to modify the Commissioner's ruling, and the Supreme Court denied her petition for discretionary review under RAP 13.3(e). *Jessica Matheson d/b/a/ Jess's Wholesale v. Dep't of Revenue*, 177 Wn.2d 1004, 300 P.3d 415 (2013). See also *State v. AU Optronics Corp.*, No. 693182-1, 2014 WL 1779256 (Wn. App. May 5, 2014) (for violations of the state's consumer protection act, the State had personal jurisdiction over nonresident business that had sales into the state and such exercise of personal jurisdiction did not violate due process.)

by limiting the scope of the hearing. Pet. Br. at 47. These contentions lack merit.

Generally, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are valid only if “a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.”

*Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions*, 133 Wn. App. 723, 758-59, 137 P.3d 78 (2006). In administrative proceedings, a presumption exists that public officials will properly perform their duties. *Id.* at 460 (citing *Washington Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 479, 663 P.2d 457 (1983)).

To overcome the presumption, a party invoking the appearance of fairness doctrine must come forth with evidence of actual or potential bias. *Organization to Preserve Agric. Lands v. Adams Cnty.*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (evidence that commissioner received 63 phone calls during the prior year from a waste management company was insufficient to demonstrate actual or potential bias because the commissioner had other matters pending with the company unrelated to the adjudicative proceeding); *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992) (no appearance of unfairness where presentence report was prepared by an allegedly biased person because there was no

evidence of the judge's actual or potential bias); *Magula v. Dep't of Labor & Indus.*, 116 Wn. App. 966, 972–73, 69 P.3d 354 (2003) (no appearance of unfairness where six electricians were among the 13 voting members deciding whether electrical work must be performed by electricians rather than general contractors).

Matheson fails to provide any evidence of actual or potential bias from the presiding officer who conducted the initial hearing. The mere fact he asked questions does not indicate he was biased. *See Sherman v. Moloney*, 106 Wn.2d 873, 725 P.2d 966 (1986) (Washington State Patrol Chief asking questions during hearing did not result in an unfair hearing to trooper being disciplined). Further, as this was a brief adjudicative proceeding, the statute required the presiding officer to advise each party of the agency's position: "Before taking action, the presiding officer shall give each party an opportunity to be informed of the agency's view of the matter and to explain the party's view of the matter." RCW 34.05.485(2). The presiding officer properly conducted the initial hearing and provided Mr. Kovacevich an opportunity to present his arguments and to question the revenue agent who initiated the tax collection action.

Matheson also contends that the Reviewing Officer improperly limited the scope of the review hearing. Pet. Br. at 47. Matheson timely requested a review of the Department's initial decision. AR at 292-95.

The Department advised the taxpayer's representative that pursuant to its rule, WAC 458-20-10001(3)(c), the review of the order would be limited to "the evidence considered by the presiding officer, the initial order, the recording of the initial proceeding, and any records and written evidence submitted by the parties to the reviewing officer." AR at 296. The Reviewing Officer did not err in declining to consider arguments other than those that were relevant to the statutory basis for revoking the registration certificate: (1) whether a warrant was issued, and (2) whether Matheson had paid the warrant or made arrangements to make payments. Both the brief adjudicative proceeding and the initial hearing were conducted properly and fairly.

**F. The Court Should Decline To Address Matheson's New Argument.**

Matheson argues for the first time before this Court that she was subjected to a cumulative penalty, the tax assessment, which included a penalty and the revocation of her license. She asserts this violated her due process rights. Pet. Br. at 49-51. She did not make this argument before the Department at either the initial hearing or at the review proceeding. Nowhere in the transcript does she suggest that she was subjected to a cumulative penalty that violated due process. *See* AR at 303-35. She did

not make this argument before the Superior Court. *See* CP at 77-90, 177-185.

Because she failed to raise these arguments before the agency in this case, RCW 34.05.554 bars Matheson's argument. Her argument also is barred by *res judicata*. When she challenged the underlying assessment in her earlier appeal, she argued that the fine included in the assessment was excessive and violated due process. The Commissioner rejected her claim, holding that it was not constitutionally excessive and her arguments were clearly without merit. As the Court stated, the state had a strong interest in deterrence. *See* Ruling Granting Motion on the Merits at 14-15 in Appendix.

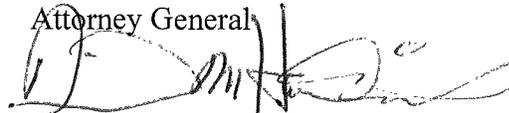
Matheson essentially argues that when a taxpayer fails to pay a tax and penalty, the Department cannot revoke the registration certificate, because such remedy would violate due process. If the Court were to accept such argument, delinquent taxpayers would have no incentive to pay the tax, and could continue to operate without consequence. The Legislature created a rational and constitutional scheme to incentivize payment of the tax. The Court should disregard Matheson's new argument.

## V. CONCLUSION

Substantial evidence supports the Department's findings that Matheson, who voluntarily obtained a registration certificate with a license to operate as a cigarette wholesaler, failed to pay the applicable tax. She was properly served the notice of the revocation hearing at the only business address she provided to the Department. The decision to revoke her registration certificate should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of May, 2014.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, appearing to read "D. M. Hankins", is written over a horizontal line.

DAVID M. HANKINS  
Senior Counsel  
WSBA No. 19194

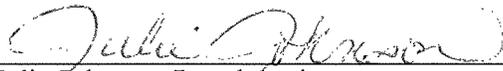
**PROOF OF SERVICE**

I certify that I served a copy of this document, electronically by email per agreement, on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of May, 2014, at Tumwater, WA.

  
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Julie Johnson, Legal Assistant

# **APPENDICES**

**WAC 458-20-10001**

## **WAC 458-20-10001**

### **Adjudicative proceedings—Brief adjudicative proceedings— Certificate of registration (tax registration endorsement) revocation.**

(1) **Introduction.** The department of revenue (department) has adopted the procedure for brief adjudicative proceedings provided in RCW 34.05.482 through 34.05.494, except for RCW 34.05.491(5), for actions involving revocation of a certificate of registration (tax registration endorsement) pursuant to RCW 82.32.215. This section explains the procedure for these brief adjudicative proceedings. This section does not apply to the following:

- Adjudicative proceedings under WAC 458-20-10002, which addresses converted brief adjudicative proceedings and formal adjudicative proceedings relating to log export enforcements;
- Nonadjudicative proceedings under RCW 82.32.160 and 82.32.170, and WAC 458-20-100;
- Enforcement proceedings under RCW 82.24.550 and 82.26.220; and
- Brief adjudicative proceedings for matters relating to the revocation of reseller permits under WAC 458-20-102.

The department has not adopted RCW 34.05.491(5), which provides that a request for administrative review is deemed to have been denied if the agency does not make a disposition of the matter within twenty days after the request is submitted.

(2) **Brief adjudicative proceedings - procedure.** The following procedure applies to the department's brief adjudicative proceedings for actions involving revocation of a certificate of registration, unless the matter is converted to a formal proceeding as provided in subsection (8) of this section.

(a) **Notice.** The department will set the time and place of the hearing. Written notice shall be served upon the taxpayer(s) at least seven days before the date of the hearing. Service is to be made pursuant to subsection (5)(a) of this section. The notice must include:

- (i) The names and addresses of each taxpayer to whom the proceedings apply and, if known, the names and addresses of the taxpayer's representative(s), if any;
- (ii) The mailing address and the telephone number of the person or office designated to represent the department in the proceeding;
- (iii) The official file or other reference number and the name of the proceeding;
- (iv) The name, official title, mailing address and telephone number of the presiding officer, if known;
- (v) A statement of the time, place and nature of the proceeding;
- (vi) A statement of the legal authority and jurisdiction under which the hearing is to be held;
- (vii) A reference to the particular sections of the statutes and/or rules involved;
- (viii) A short and plain statement of the matters asserted by the department against the taxpayer and the potential action to be taken; and
- (ix) A statement that if the taxpayer fails to attend or participate in a hearing, the hearing can proceed and that adverse action may be taken against the taxpayer.

(x) When the department is notified or otherwise made aware that a limited-English-speaking person is a person to whom the proceedings apply, all notices, including the notice of hearing, continuance and dismissal, must either be in the primary language of that person or must include a notice in the primary language of the person which describes the significance of the notice and how the person may receive assistance in understanding and responding to the notice. In addition, the notice must state that if a party or witness needs an interpreter, a qualified interpreter will be appointed at no cost to the party or witness. The notice must include a form to be returned to the department to indicate whether such person, or a witness, needs an interpreter and to identify the primary language or hearing impaired status of the person.

(b) **Appearance and practice at a brief adjudicative proceeding.** The right to practice before the department in a brief adjudicative proceeding is limited to:

- (i) Persons who are natural persons representing themselves;
- (ii) Attorneys at law duly qualified and entitled to practice in the courts of the state of Washington;
- (iii) Attorneys at law entitled to practice before the highest court of record of any other state, if attorneys licensed in Washington are permitted to appear before the courts of such other state in a

- representative capacity, and if not otherwise prohibited by state law;
- (iv) Public officials in their official capacity;
- (v) Certified public accountants entitled to practice in the state of Washington;
- (vi) A duly authorized director, officer, or full-time employee of an individual firm, association, partnership, or corporation who appears for such firm, association, partnership, or corporation;
- (vii) Partners, joint venturers or trustees representing their respective partnerships, joint ventures, or trusts; and
- (viii) Other persons designated by a person to whom the proceedings apply with the approval of the presiding officer.

In the event a proceeding is converted from a brief adjudicative proceeding to a formal proceeding, representation is limited to the provisions of law and RCW 34.05.428.

(c) **Hearings by telephone.** With the concurrence of the presiding officer and all persons involved in the proceedings, a hearing may be conducted telephonically. The conversation will be recorded and will be made a part of the record of the hearing.

(d) **Presiding officer.**

(i) The presiding officer must be an assistant director of the department's compliance division, or such other person as the director of the department may designate.

(ii) The presiding officer shall conduct the proceeding in a just and fair manner and before taking action, the presiding officer shall provide the taxpayer an opportunity to be informed of the department's position on the pending matter.

(iii) The presiding officer has all authority granted under chapter 34.05 RCW.

(e) **Entry of orders.**

(i) When the presiding officer issues a decision, the presiding officer shall briefly state the basis and legal authority for the decision. Within ten days of issuing the decision, the presiding officer shall serve upon the parties, the initial order and information regarding any departmental administrative review that may be available.

(ii) The decision and the brief written statement of the basis and legal authority for it is an initial order. The initial order will become a final order if no review is requested as provided in subsection (3) of this section.

(3) **Review of initial orders from brief adjudicative proceeding.** The following procedure applies to the department's review of a brief adjudicative proceeding conducted pursuant to subsection (2) of this section, unless the matter is converted to a formal proceeding as provided in subsection (8) of this section.

(a) **Request for review of the initial order.** A party to a brief adjudicative proceeding under subsection (2) of this section may request review of the initial order by filing a written petition for review, or making an oral request for review, with the department's appeals division within twenty-one days after service of the initial order is received or deemed to be received by the party. The address and telephone number of the appeals division is:

Appeals Division  
Department of Revenue  
P.O. Box 47460  
Olympia, Washington 98504-7460  
Telephone Number: 360-534-1335  
Fax: 360-534-1340

(i) When a petition of review of the initial order is made, the taxpayer must submit to the appeals division at the time the petition is filed any evidence or written material relevant to the matter that the party wishes the reviewing officer to consider. If the petition for review is made by oral request, the taxpayer must also submit any evidence or written material to the appeals division on the same day that the oral request is made.

(ii) The department may, on its own motion, conduct an administrative review of the initial order as provided for in RCW 34.05.491.

(b) **Reviewing officer.** The appeals division shall appoint a reviewing officer who shall make such determination as may appear to be just and lawful. The reviewing officer shall provide the taxpayer and the department an opportunity to explain their positions on the matter and shall make any inquiries

necessary to ascertain whether the proceeding should be converted to a formal adjudicative proceeding. The review by the appeals division shall be governed by the brief adjudicative procedures of chapter 34.05 RCW and this section; or WAC 458-20-10002 in the event a brief adjudicative hearing is converted to a formal adjudicative proceeding, and not by the processes and procedures of WAC 458-20-100. The reviewing officer shall have the authority of a presiding officer as provided in this section.

(c) **Record review.** Review of an initial order is limited to the evidence considered by the presiding officer, the initial order, the recording of the initial proceeding, and any records and written evidence submitted by the parties to the reviewing officer. However, the agency record need not constitute the exclusive basis for the reviewing officer's decision.

(i) The reviewing officer may request additional evidence from either party at any time during its review of the initial order. Once the reviewing officer requests evidence from a party, that party has seven days after service of the request to supply the evidence to the reviewing officer, unless the reviewing officer, in his or her discretion, allows additional time to submit the evidence.

(ii) In addition to requesting additional evidence, the reviewing officer may review any records of the department necessary to confirm that the tax warrant upon which the initial order of revocation was based remains unpaid. In the event that the tax warrant has been satisfied subsequent to the entry of the initial order, but before the issuance of the final order, the reviewing officer shall reinstate the taxpayer's certificate of registration.

(iii) If the reviewing officer determines that oral testimony is needed, he/she may schedule a time for both parties to present oral testimony. Notice of the oral testimony must be given to the parties in the same manner as the notice provided in subsection (2)(a) of this section. Oral statements before the reviewing officer shall be by telephone, unless specifically scheduled by the reviewing officer in his or her discretion to be in person.

(iv) The department will have an opportunity to respond to the taxpayer's request for review and may also submit any other relevant evidence and written material to the reviewing officer. The department must submit its material within seven days of service of the material submitted by the party requesting review of the initial order. The department must also serve a copy of all evidence and written material provided to the reviewing officer to the taxpayer requesting review according to subsection (5) of this section. Proof of service is required under subsection (5)(h) of this section when the department submits material to the taxpayer under this subsection.

(d) **Failure to participate.** If a party requesting review of an initial order under this subsection fails to participate in the proceeding or fails to provide documentation to the reviewing officer upon his or her request, the reviewing officer may uphold the initial order based upon the record.

(e) **The final orders.**

(i) The reviewing officer may issue two final orders. The first final order (the "final order") must include the decision of the reviewing officer and a brief statement of the basis and legal authority for the decision. This order may contain confidential taxpayer information under RCW 82.32.330, and, therefore, cannot be disclosed by the department, except to the taxpayer.

(ii) The reviewing officer may issue a second final order (the "posting order"). The posting order will be issued when the reviewing officer has ordered the revocation of the tax registration certificate. The posting order will state what certificate of registration is being revoked, the listing of the tax warrants involved, and what jurisdictions the tax warrants were filed in.

(iii) Unless specifically indicated otherwise, the term "final order" as used throughout this section shall refer to both the final order and the posting order.

(iv) The parties can expect that, absent continuances, the final order and posting order will be entered within twenty days of the petition for review.

(f) **Reconsideration.** Unless otherwise provided in the reviewing officer's order, the reviewing officer's order represents the final position of the department. A reconsideration of the reviewing officer's order may be sought only if the right to a reconsideration is contained in the final order.

(g) **Judicial review.** Judicial review of the final order of the department is available under Part V, chapter 34.05 RCW. However, judicial review may be available only if a review of the initial decision has been requested under this subsection and all other administrative remedies have been exhausted. See RCW 34.05.534.

(4) **Rules of evidence - record of the proceeding.**

(a) Evidence is admissible if in the judgment of the presiding or reviewing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely on in conducting their affairs. The presiding and reviewing officer should apply RCW 34.05.452 when ruling on evidentiary issues in the proceeding.

(b) All oral testimony must be recorded manually, electronically, or by another type of recording device. The agency record must consist of the documents regarding the matters that were considered or prepared by the presiding officer, or by the reviewing officer in any review, and the recording of the hearing. These records must be maintained by the department as its official record.

(5) **Service.** All notices and other pleadings or papers filed with the presiding or reviewing officer must be served on the taxpayer, their representatives/agents of record, and the department.

(a) Service is made by one of the following methods:

- In person;
- By first-class, registered, or certified mail;
- By fax and same-day mailing of copies;
- By commercial parcel delivery company; or
- By electronic delivery pursuant to RCW 82.32.135.

(b) Service by mail is regarded as completed upon deposit in the United States mail properly stamped and addressed.

(c) Service by electronic fax is regarded as completed upon the production by the fax machine of confirmation of transmission.

(d) Service by commercial parcel delivery is regarded as completed upon delivery to the parcel delivery company, properly addressed with charges prepaid.

(e) Service by electronic delivery is regarded as completed on the date that the department electronically sends the information to the parties or electronically notifies the parties that the information is available to be accessed by them.

(f) Service to a taxpayer, their representative/agent of record, the department, and presiding officer must be to the address shown on the notice described in subsection (3)(a) of this section.

(g) Service to the reviewing officer must be to the appeals division at the address shown in subsection (3) of this section.

(h) Where proof of service is required, the proof of service must include:

- An acknowledgment of service;
- A certification, signed by the person who served the document(s), stating the date of service; that the person did serve the document(s) upon all or one or more of the parties of record in the proceeding by delivering a copy in person to (names); and that the service was accomplished by a method of service as provided in this subsection.

(6) **Interpreters.** When a party or witness requires an interpreter, chapters 2.42 and 2.43 RCW will apply. When those statutes are silent on an issue before the presiding or reviewing officer, the provisions regarding interpreters in WAC 10-08-150 apply.

(7) **Informal settlements.** The department encourages informal settlement of issues in proceedings under its jurisdiction. The presiding or reviewing officer may not order settlement of the proceedings. Settlement is at the discretion of the parties. Settlement of a proceeding may be concluded by:

(a) A stipulation signed by the taxpayer and the department, or their respective representatives, and/or recited into the record of the proceedings. If the stipulation provides for a payment agreement, the presiding or reviewing officer may order a continuance of the proceedings during the period of repayment and dismissal when all payments have been made. An order providing for the reconvening of the proceedings if the payment agreement is breached is allowed so long as the proceeding is not held less than seven days after notice of the reconvening is provided. Except as provided in this subsection, the presiding or reviewing officer must enter an order in conformity with the terms of the stipulation; or

(b) The entry of an order dismissing the proceedings if the department withdraws the revocation of the certificate of registration.

(8) **Conversion of a brief adjudicative proceeding to a formal proceeding.** The presiding or reviewing officer may at any time, on motion of the taxpayer, the department, or the officer's own motion, convert the brief adjudicative proceeding to a formal proceeding.

(a) The presiding or reviewing officer may convert the proceeding if the officer finds that use of the

brief adjudicative proceeding:

- Violates any provision of law,
- The protection of the public interest requires the agency to give notice to and an opportunity to participate to persons other than the parties, or
- The issues and interests involved warrant the use of procedures governed by RCW 34.05.413 through 34.05.476 or 34.05.479.

(b) WAC 458-20-10002 applies to formal proceedings. In proceedings to revoke a taxpayer's certificate of registration, the converted proceeding is itself the independent administrative review by the department of revenue as provided in RCW 82.32A.020(6).

(9) **Computation of time.** In computing any period of time prescribed by this section, the day of the act or event after which the designated period is to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, or a state legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday, or state legal holiday. When the period of time prescribed is less than seven days, intermediate Saturdays, Sundays, and holidays will be excluded in the computation.

(10) **Posting of a final order of revoking a tax registration endorsement - revocation not a substitute for other collection methods or processes available to the department.** When an order revoking a tax registration endorsement is a final order of the department, the department shall post a copy of the posting order in a conspicuous place at the main entrance to the taxpayer's place of business and it must remain posted until such time as the warrant amount has been paid.

(a) It is unlawful to engage in business after the revocation of a tax registration endorsement. A person engaging in the business after a revocation may be subject to criminal sanctions as provided in RCW 82.32.290. RCW 82.32.290(2) provides that a person violating the prohibition against such engaging in business is guilty of a Class C felony in accordance with chapter 9A.20 RCW.

(b) Any certificate of registration revoked shall not be reinstated, nor a new certificate of registration issued until:

(i) The amount due on the warrant has been paid, or provisions for payment satisfactory to the department of revenue have been entered; and

(ii) The taxpayer has deposited with the department of revenue as security for taxes, increases and penalties due or which may become due under such terms and conditions as the department of revenue may require, but the amount of the security may not be greater than one-half the estimated average annual tax liability of the taxpayer.

(c) Revocation proceedings will not substitute for, or in any way curtail, other collection methods or processes available to the department.

[Statutory Authority: RCW 82.32.300 and 82.01.060(2). WSR 11-17-094, § 458-20-10001, filed 8/22/11, effective 9/22/11. Statutory Authority: RCW 82.32.300 and 82.01.060. WSR 11-04-056, § 458-20-10001, filed 1/26/11, effective 2/26/11. Statutory Authority: RCW 82.32.300 and 34.05.410. WSR 95-07-070, § 458-20-10001, filed 3/14/95, effective 4/14/95.]

## **Ruling Granting Motion on the Merits**

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DIVISION II

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STATE OF WASHINGTON

BY cm  
DEPUTY

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

JESSICA MAE MATHESON, dba  
JESS'S WHOLESALÉ,

Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF REVENUE,

Respondent.

No. 42723-1-II

RULING GRANTING MOTION  
ON THE MERITS TO AFFIRM

Jessica Mae Matheson<sup>1</sup> sought superior court review of a Board of Tax Appeals decision ordering her to pay over \$8 million in taxes, interest, and penalties for failing to pay cigarette taxes on 703,400 packs of cigarettes she acquired through her wholesaler company, Jess's Wholesale. The superior court dismissed her petition, ruling that Jessica had failed to pay the contested tax,

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<sup>1</sup> For clarity, this ruling refers to the various Mathesons by their first names. No disrespect is intended.

which is a statutory prerequisite to obtaining review, and that a restraining order on the tax collection is inappropriate. Because Jessica failed to pay the contested tax before seeking review and because her constitutional challenges are meritless, the superior court correctly dismissed her petition. Accordingly, this court grants the motion on the merits to affirm. RAP 18.14.

#### FACTS

Jessica is a registered member of the Puyallup Indian Tribe. In July 2006, she obtained a Washington cigarette wholesaler's license under the trade name "Jess's Wholesale." Administrative Record (ARC) at 545. It operated as a sole proprietorship, and she listed a Milton address for the office.

Between July 2006 and June 2007, two Spokane area cigarette distributors, Burke's Distributing and Blacksheep Distributing, sold 703,400 packs of unstamped cigarettes to Jess's Wholesale. Neither distributor is located on a reservation or in Indian Country.<sup>2</sup> Jessica never purchased Washington State or Puyallup tribal cigarette tax stamps, so she could not have stamped these cigarettes.

The Department of Revenue soon began investigating whether Jessica sold the unstamped cigarettes. Jessica, through her attorney, first claimed that she sold the cigarettes only to Baby Zack's, her father's tribally-licensed retailer located on the Puyallup Reservation.

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<sup>2</sup> Indian Country includes all lands within an Indian Reservation, all dependent Indian communities, and all Indian allotments. 18 U.S.C. § 1151.

When the Department requested Schedule C reports—reports that wholesalers statutorily must file with the Department detailing their transfers of stamped and unstamped cigarettes—Jessica's attorney provided a Schedule C report claiming that she sold 103,900 cigarette packs to Baby Zack's. She failed to account for the remaining packs.

Jessica's attorney also claimed that the distributors had stamped the cigarettes before selling them to her. Both distributors refuted this claim, submitting their own Schedule C reports. Jessica's attorney then claimed that the distributors delivered the cigarettes in Idaho, upon her request. The distributors, however, showed that Jess's Wholesale picked up the cigarettes in Spokane.

By January 2008, Jessica had not provided Schedule C reports documenting sale or disposal of the unstamped cigarettes. The Department assessed her \$1,424,385 in taxes and a \$10-per-pack penalty of \$7,034,000, plus additional penalties and interest. When Jessica appealed to the Department's internal appeals division, the appeals division offered her another opportunity to provide the Schedule C reports. She failed to do so, and the appeals division upheld the assessment.

Jessica then sought an informal appeal to the Board of Tax Appeals (BTA). The Department converted the appeal to a formal proceeding. See RCW 82.03.140 (permitting the Department to convert an informal appeal to a formal appeal).

Before the formal hearing, Jessica provided Schedule C reports stating that she made no sales in June 2006 and from January to June 2007. She provided no information for sales made between September to December 2006.

At the hearing, Jessica appeared only through her attorney and did not testify. She elicited testimony from the manager of Baby Zack's that her father's store had never purchased cigarettes from Jess's Wholesale.

Her brother, Nick Matheson, submitted amended Schedule C reports that he had signed in 2010 stating that the unstamped cigarettes were delivered to Nick's home in Idaho. Errors in the reports included that the reports merely copied the monthly totals from the two distributors' Schedule C reports, even though not all of the lines reflected sales to Jess's Wholesale, thus falsely indicating that Jess's Wholesale purchased and sold more than 3 million unstamped cigarette packs.

Nick claimed that he acquired all of Jessica's cigarettes, but he admitted that no invoices or other corroborating documentation showed that Jessica sold any unstamped cigarettes to him or his retail business. He confirmed that Jess's Wholesale picked up the unstamped cigarettes from the Spokane distributors.

The BTA upheld the Department's assessment. It found that Jessica failed to meet her burden of proving that she disposed the unstamped cigarettes through tax-exempt activity. The BTA found that Baby Zack's manager was credible and that Jessica never sold cigarettes to Baby Zack's on the Puyallup reservation. It also rejected Nick's explanation that he acquired all of the cigarettes, finding that no one reported the transfer until 2010, that Nick did not

know how much he paid for the cigarettes, that he had no documentation, and that he did not know who created the Schedule C reports.

Jessica petitioned for review in Thurston County Superior Court and sought a restraining order. The Department moved to dismiss, arguing that Jessica failed to pay the contested tax, penalties, and interest before seeking review, as required by statute. It also argued that she could not seek an injunction, but even if she could, her legal arguments were incorrect. The superior court dismissed the petition. Jessica appeals. The Department filed a motion on the merits.

## ANALYSIS

### I. Standard of Review

This court will grant a motion on the merits to affirm if the appeal is clearly without merit. RAP 18.14(e)(1). It considers all relevant factors, including whether the issues on review are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision was clearly within the trial court's or administrative agency's discretion. RAP 18.14(e)(1).

This court reviews constitutional questions and questions of jurisdiction *de novo*. *In re Personal Restraint of Talley*, 172 Wn.2d 642, 649, 260 P.3d 868 (2011); *Crosby v. County of Spokane*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). When reviewing a Board of Tax Appeals' decision, it reviews the findings of fact for substantial evidence. RCW 34.05.570(3)(e); *Xenith Group, Inc. v. Department of Labor & Indus.*, 167 Wn. App. 389, 393, 269 P.3d 414 (2012).

The court sits in the same position as the superior court, limiting its review to the administrative record. *Xenith Group*, 167 Wn. App. at 393. The challenger bears the burden of proving that an agency action is invalid. RCW 34.05.570(1)(a).

## II. Overview of Cigarette Tax Laws<sup>3</sup>

To understand the parties' arguments, it is first necessary to examine Washington's cigarette tax scheme. Washington's cigarette tax is levied upon the "sale, use, consumption, handling, possession, or distribution of all cigarettes." RCW 82.24.020(1). The tax is to be collected from the person who first performs a taxable act in Washington. RCW 82.24.080(1) and (2).

The Department collects the tax through tax stamps. RCW 82.24.030. Only licensed wholesalers can purchase cigarette tax stamps from the Department, which they affix to each pack of cigarettes. RCW 82.24.030(2). Once stamped, cigarettes can be sold to licensed cigarette retailers, to be sold to the public. RCW 82.24.040(5). Cigarette retailers cannot legally possess unstamped cigarettes unless they also hold a wholesaler's license. RCW 82.24.040(1).

A licensed cigarette wholesaler can sell cigarettes in several ways:

- She can purchase tax stamps from the Department, affix them to cigarette packs, and sell them to a licensed retailer. RCW 82.24.040; WAC 458-20-186(101)(b).

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<sup>3</sup> Many of the relevant statutes and regulations have since been amended in ways not material to this case. Unless otherwise noted, this decision refers to the current versions where there were no changes relevant to the facts and arguments in this case.

- She can sell the unstamped cigarettes to another Washington licensed wholesaler. RCW 82.24.040(2).
- She can sell unstamped cigarettes to a person in another state or country, or to federal government instrumentalities. RCW 82.24.040(2)(b); WAC 458-20-186(302) & (304).
- Or she can sell unstamped cigarettes to a tribally licensed wholesaler or retailer on an Indian reservation, if that tribe has a compact with Washington providing for tribal cigarette tax stamps. RCW 82.24.020(5); RCW 82.24.295; WAC 458-20-186(303); see *State v. Comenout*, 173 Wn.2d 235, 241, 267 P.3d 355 (2011), *cert. denied*, 132 S. Ct. 2402 (2012).

Both federal and state laws require cigarette wholesalers to carefully track and report to the Department any sales of unstamped cigarettes. RCW 82.24.040(3) (invoice copies for out-of-state sales must be filed monthly); 15 U.S.C. § 376 (sales into other states or onto Indian reservations must be reported). As a result, wholesalers are to use monthly Schedule C reports to report their sales.

### III. The Superior Court Properly Dismissed the Petition Because Jessica Failed to Pay the Contested Tax

The Department argues that the superior court properly dismissed the petition because Jessica failed to pay the contested tax, as required by statute. Jessica responds that she is not a taxpayer and thus not subject to the statute. Because RCW 82.03.180 plainly required Jessica to pay the contested tax, the superior court correctly dismissed her petition and her appeal on this basis is clearly without merit. RAP 18.14(e)(1).

RCW 82.03.180 governs superior court review of BTA decisions. It provides that where the BTA rendered a decision after a formal hearing, a party

may seek review in superior court pursuant to the Administrative Procedures Act, but the taxpayer must first pay the contested tax, interest, and penalties:

Judicial review of a decision of the board of tax appeals shall be de novo in accordance with the provisions of RCW 82.32.180 or 84.68.020 as applicable except when the decision has been rendered pursuant to a formal hearing elected under RCW 82.03.140 or 82.03.190, in which event judicial review may be obtained only pursuant to RCW 34.05.510 through 34.05.598: PROVIDED, HOWEVER, That nothing herein shall be construed to modify the rights of a taxpayer conferred by RCW 82.32.180 and 84.68.020 to sue for tax refunds: AND PROVIDED FURTHER, That no review from a decision made pursuant to RCW 82.03.130(1)(a) may be obtained by a taxpayer unless within the petition period provided by RCW 34.05.542 the taxpayer shall have first paid in full the contested tax, together with all penalties and interest thereon, if any.

RCW 82.03.180.<sup>4</sup>

Not only does the plain statutory language require prepayment of the contested tax, but Washington appellate courts have previously used RCW 82.03.180 as a bar to judicial review. *Booker Auction Co. v. Department of Revenue*, 158 Wn. App. 84, 88-89, 241 P.3d 439 (2010).

The *Booker Auction* Court held that a taxpayer seeking review of a BTA decision must first pay the tax in full, explaining that RCW 82.03.180 is jurisdictional and that prepayment was consistent with the public interest in not disrupting tax streams into the treasury. 158 Wn. App. at 89. The court held that based "on the clear statutory language of RCW 82.32.150 and RCW 82.03.180, the superior court does not have jurisdiction to hear [the taxpayer's] complaint

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<sup>4</sup> RCW 82.32.150 similarly provides that "[a]ll taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest."

until an auction sale occurs and the excise tax is paid." *Booker Auction*, 158 Wn. App. at 89.

Here, it is undisputed that Jessica has not paid in full the contested tax, penalties, and interest. Under the plain language of RCW 82.03.180, she could not obtain judicial review unless she did so. The superior court correctly dismissed her petition for review because she failed to meet the plain statutory prerequisite. Since the superior court's decision followed well-settled law, Jessica's appeal is without merit. RAP 18.14(e).

Jessica further argues that she is not a taxpayer, so RCW 82.03.180 does not apply. But, for purposes of Title 82, a "'taxpayer' includes any individual, group of individuals, corporation, or association liable for any tax or the collection of any tax hereunder, or who engages in any business or performs any act for which a tax is imposed by this title." RCW 82.02.010(3). Jessica, an individual, was liable for the cigarette tax when she petitioned for review. She therefore qualifies as a taxpayer. *See Booker Auction*, 158 Wn. App. at 88 n.1 (rejecting Booker Auction's argument that it was not a taxpayer). Her argument fails, and the superior court correctly dismissed the petition.

#### IV. Jessica's Constitutional Arguments Are Meritless, So She Cannot Obtain Injunctive Relief

To get around the statutory prepayment requirement, Jessica argues that the superior court can award injunctive relief to restrain the collection of a tax or tax penalty based on various constitutional violations. The Department argues that Jessica cannot obtain injunctive relief for constitutional violations, but even if

she could, her arguments are meritless. While Jessica could seek injunctive relief, the superior court correctly dismissed her petition because well-settled law shows that she failed to prove that she would likely prevail.

At the outset, the Department argues that Jessica cannot seek injunctive relief. Its argument fails.

A taxpayer has three options following the Department's tax decision. First, she can pay the tax and penalties and then seek a refund directly in Thurston County. RCW 82.32.180. Second, RCW 82.32.150 allows the taxpayer to obtain an injunction or restraining order for constitutional violations:

All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

Third, she can appeal to the BTA, without prepayment of the tax, penalties, and interest due. RCW 82.32.180.

Chapter 82.32 RCW "does not expressly prohibit a taxpayer from seeking administrative and court review simultaneously." *AOL, LLC v. Department of Revenue*, 149 Wn. App. 533, 544, 205 P.3d 159 (2009).<sup>5</sup> In *Booker Auction*, for example, Division Three of this court held that both RCW 82.03.180 and RCW 82.32.150 applied on appeal from a BTA decision. 158 Wn. App. at 88-89. The *Booker Auction* Court held that according to "the plain language of [RCW

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<sup>5</sup> While the Department recognizes these three options, it does not argue or cite authority for the proposition that Jessica had to choose only a single option.

82.32.150], the sole time when collection of a tax can be prospectively enjoined is when a tax assessment violates the federal or state constitution.” 158 Wn. App. at 88.

Here, Jessica sought review of the BTA decision and requested injunctive relief. Since chapter 82.32 RCW nowhere prohibits her from utilizing these two approaches simultaneously and since case law has recognized RCW 82.03.180's and RCW 82.32.150's interrelationship, Jessica could seek injunctive relief to avoid the prepayment requirement.<sup>6</sup>

Jessica's constitutional arguments are nonetheless meritless because well-settled law controls or her factual assertions are not supported by the record. RAP 18.14(e)(1). Thus, the superior court correctly dismissed her petition.<sup>7</sup>

For a taxpayer to obtain injunctive relief, she must show a violation of a clear legal or equitable right:

It is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.

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<sup>6</sup> To the extent Jessica makes nonconstitutional arguments, they remain barred by RCW 82.03.180.

<sup>7</sup> This court may affirm on any ground established by the law and the record. *State v. Villarreal*, 97 Wn. App. 636, 643, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008 (2000).

*Tyler Pipe Indus., Inc. v. Department of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). When examining the first factor, the court must determine the likelihood of the moving party ultimately prevailing on the merits. *Tyler Pipe*, 96 Wn.2d at 793. An injunction “will not issue in a doubtful case.” *Tyler Pipe*, 96 Wn.2d at 793 (quoting *Isthmian S.S. Co. v. National Marine Eng’rs’ Beneficial Ass’n*, 41 Wn.2d 106, 117, 247 P.2d 549 (1952)).

Turning to Jessica’s constitutional arguments, they are meritless, so she would not likely ultimately prevail on the merits. First, Jessica contends that Washington cannot regulate interstate or on-reservation shipments of cigarettes. But, Jessica failed to prove that she shipped the cigarettes in question to another state or onto an Indian reservation.

As the taxpayer challenging the Department’s decision, Jessica bore the burden when challenging the tax. RCW 34.05.570(1)(a). Jessica acquired the cigarettes outside of Indian country. While she claimed that she transferred the cigarettes either to another member of an Indian tribe or out of State—both tax-exempt transfers—the BTA found her version not credible. Appellate courts will not review an administrative agency’s credibility findings. *Goldsmith v. Department of Social & Health Servs.*, \_\_\_ Wn. App. \_\_\_, 280 P.3d 1173, 1176 (2012). She failed to meet her burden before the BTA, so she has failed to establish the prerequisite fact that she transferred the cigarettes to another tribal member or out-of-state. See also RAP 18.14(e)(1)(b) and (c). Her argument is without merit.

Jessica next argues that she was not a taxpayer and lacks sufficient contacts or nexus with Washington to be responsible for Washington tax. To satisfy due process, a taxpayer must have “sufficient contacts with the taxing state such that imposing the tax does not offend traditional notions of fair play and substantial justice.” *Lamtec Corp. v. Department of Revenue*, 170 Wn.2d 838, 843, 246 P.3d 788, *cert. denied*, 132 S. Ct. 95 (2011) (internal quotations omitted); see U.S. CONST. amend XIV.

Under the Commerce Clause, “the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales.” *Lamtec*, 170 Wn.2d at 850 (internal quotations omitted); see U.S. CONST. art. I, § 8, cl. 3. For example, even periodic visits by the taxpayer’s employees can establish nexus. *Lamtec*, 170 Wn.2d at 846, 851.

Here, Jessica had the requisite contacts and nexus for the Department to tax her. She voluntarily obtained a Washington cigarette wholesaler license, allowing her to possess and transport unstamped cigarettes in Washington. RCW 82.24.040. As a licensed wholesaler, she had to pay the cigarette tax or report the exempt disposition of unstamped cigarettes. RCW 82.24.040. It is undisputed that she or her employees drove into non-Indian Washington land to purchase cigarettes. She presented no credible evidence proving that she sold those cigarettes anywhere but in Washington. By taking affirmative steps to engage in wholesaling cigarettes in Washington, Jessica established sufficient

contacts and nexus to satisfy the Due Process and Commerce Clauses. Her arguments to the contrary lack any merit.

Third, Jessica argues that she is immune from all state taxes because she is an Indian. But, Indians who conduct business off-reservation are subject to generally applicable state law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (citing cases). A state may not tax Indians for on-reservation activities. *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 173 (2d Cir. 2005) (“the Indian Commerce Clause’s grant of authority to the federal government, and preemption of state authority, extends only to activities occurring in ‘Indian country’”), *cert. denied*, 549 U.S. 951 (2006). Because Jessica presented no credible evidence showing that any of her activities occurred on-reservation, her argument fails.<sup>8</sup>

Finally, Jessica contends that the fine was excessive under the Due Process Clause and the Eighth Amendment to the U.S. Constitution. Even assuming that the constitutional excessive fine analysis applies to the penalty, Jessica’s argument fails.

When deciding whether a fine is disproportionate to the offense so that it is constitutionally excessive, we compare the fine amount to the gravity of the offense, and if it is grossly disproportional, it is unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 336-37, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

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<sup>8</sup> Her argument that Article 26 of the Washington State Constitution provides that Congress has exclusive power over enrolled Indians is also flawed, where that provision applies only to Indian lands. WASH. CONST. art. XXVI, § 2.

This standard derives from two important considerations: (1) courts give the legislature substantial deference in making a judgment about the appropriate punishment for an offense; and (2) any judicial determination regarding the gravity of an offense will be inherently imprecise. *Bajakajian*, 524 U.S. at 336.

Here, the Legislature determined that the remedial penalty for failing to pay cigarette taxes is either \$10-per-pack or \$250, whichever is greater. RCW 82.24.120(1). Giving that legislative decision its due deference, it is not grossly disproportional. The legislature has a strong government interest in deterring tax evasion and the black market sales of cigarettes. See *Bajakajian*, 524 U.S. at 338 (suggesting tax evasion warrants higher fines).

A cigarette wholesaler who sells unstamped cigarettes without paying the taxes significantly impacts the public fisc. In this case, between 2006 and 2007, the state cigarette tax amounted to \$2.025 per pack, while the federal excise tax amounted to an additional \$0.39 per pack. ARC at 716-18; former RCW 82.24.020 through .028 (1994); former 26 U.S.C. § 5701(b) (1997). The state tax has increased to \$3.025 per pack, and the federal tax has increased to \$1.01 per pack. RCW 82.24.020 through .028; 26 U.S.C. § 5701(b). And since the fine, like the tax, is on a per-pack basis, the penalty increases based on the amount of packs that have not been stamped. Jessica's penalty is over \$7 million because she did not pay taxes on 703,400 packs. Since the state has a strong interest in deterrence and making its public dollars, well-settled law shows that the fine was not constitutionally excessive.

Jessica's constitutional arguments are clearly without merit and unsupported by settled case law. Because she could not prevail on the merits of her constitutional claims, the superior court correctly denied injunctive relief. Her appeal is without merit. RAP 18.14(e)(1)(a)-(c). Accordingly, it is hereby

ORDERED that the Department's motion on the merits is granted and the superior court's decision is affirmed.

DATED this 17<sup>th</sup> day of September, 2012.



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Aurora R. Béarse  
Court Commissioner

cc: Robert E. Kovacevich  
David Hankins  
Rebecca Glasgow  
Hon. Thomas McPhee

**WASHINGTON STATE ATTORNEY GENERAL**

**May 09, 2014 - 11:27 AM**

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